

De Castro (Migration) [2022] AATA 1771 (13 April 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Lyn Ricafort De Castro Miss Gabrielle Mae De Castro Perez
REPRESENTATIVE:	Mr Westly Russell (MARN: 0316072)
CASE NUMBER:	1935593
HOME AFFAIRS REFERENCE(S):	BCC2018/3703194
MEMBER:	Peter Emmerton
DATE:	13 April 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • The Tribunal finds that the secondary applicant is a member of a family unit of a person who satisfies the primary criteria of cl.820.211 and cl.820.221.

Statement made on 13 April 2022 at 12:41pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first named applicant (the applicant) applied for the visa on 11 October 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because they were not satisfied that they were in a genuine spousal relationship.
5. The applicant appeared before the Tribunal, via video, on 13 April 2022 to give evidence and present arguments. The Tribunal also received evidence from the Sponsor Mr Konstantinos Mitris and the secondary applicant.
6. The Tribunal hearing was conducted with the assistance of an interpreter fluent in the Filipino and English languages.
7. The applicants were represented in relation to the review.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the couple are in a genuine spousal relationship as defined by 5F of the Act.
9. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in doing so, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their individual circumstances.
10. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department.

Whether the parties are in a spouse or de facto relationship

11. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
12. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 22 April 2018, in Port Augusta, South Australia, in a civil ceremony. A valid Certificate of Marriage was provided to the delegate at the time of application and this evidence is not in dispute. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

14. The applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BS) (Subclass 801) visa on 11 October 2018.
15. The applicant arrived in Australia on 15 February 2018. She is a female Philippines citizen. DOB 15 October 1980, living in Australia.
16. The sponsor is a male Australian citizen, DOB 30 July 1959.
17. Both the sponsor and the visa applicant are therefore beyond the age of 18.
18. The applicant and secondary applicant have not travelled outside of Australia since arrival into Australia on 15 February 2018.
19. The Tribunal has considered the documentary evidence provided to both the Department and the Tribunal. The Tribunal has had the benefit of taking oral evidence from the visa applicant, secondary visa applicant and the sponsor.
20. The following additional Declarations / Statements were provided to the Tribunal.
 - Statement of Stoyan Mitsof of 14 Sept 2020 – former work associate
 - Statement of Theos Poulis of 15 Sept 2020 – friend/acquaintance
 - Statement of Analyn McCormack of 16 Sept 2020 (also signed by David McCormack – friend)
 - Statement of Colin Northway of 19 May 2021 – Carters Retail – Acquaintance of 9 years
 - Statement of Nick Karapangiotis of 4 April 2021- former business associate
 - Statement of Pathiraja Mudiyanse Udaya Charith Pathiraja of 13 May 2021- IGA co-worker
21. The Tribunal has considered all aspects of the relationship. The Tribunal notes that in the period between the delegate's decision and the hearing before the Tribunal, it has been possible for the parties to gather and present additional relevant evidence for consideration. A substantial amount of additional and relevant evidence was presented prior to the hearing.

22.

23. Financial Aspects

24. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses. The delegate was not satisfied that the couple had demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.

25. The Tribunal accepts into evidence the following documents, which in addition to the many documents provided to the delegate at the time of the original decision, clearly demonstrate a degree of financial inter-dependence.

- Addendum of joint tenancy agreement of Applicant, signed 12 May 2021
- Joint donation Receipt Greek Orthodox Community of Coober Pedy dated 3 May 2021
- Joint electricity bill dated 9 March 2022
- Joint Westpac Banking statements - select from 2020 and 2021
- Joint Tenancy Statement - Lin Andrews Real Estate 21/07/2020
- X 8 Joint bills- District Council of Coober Pedy – Electricity and Gas through 2020 & 2021
- Coober Pedy Area School stationery purchase invoice 09/03/2022 for applicant's daughter

26. The bank accounts joint and individual clearly demonstrate the pooling of financial resources as a couple. They demonstrate a transfer of monies to pay a joint rental agreement for their current housing. They also demonstrate the purchase jointly of day-to-day household items and food.

27. The range of current joint Council Notices issued for utilities supply demonstrates their joint residential arrangement as it is addressed to them both at their abode. It also demonstrates a joint legal responsibility and liability.

28. Fixed Term Residential Tenancy Agreement and the associated Bond Lodgement form, both demonstrate joint tenancy responsibility and liability.

29. The Tribunal notes the evidence in the form of money transfer receipts, submitted to and accepted by the delegate, in relation to the sponsor's financial support of the visa applicants prior to their arrival in Australia.

30. The Tribunal places substantial weight on the forementioned evidence, much of which was cross-referenced at the hearing. It is satisfied that the applicant demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.

31. Nature of the Household

32. When assessing the nature of the household the Tribunal has considered the domestic living arrangements, shared household duties, daily routines and caring for children. The delegate was not satisfied that the couple were able to demonstrate, that the nature of their household, was consistent with two people in a genuine and continuing spousal relationship.
33. The Tribunal accepts that evidence provided which indicates that the applicant and sponsor have jointly lived at the same addresses for a substantial period of time. Evidence was provided of the residence in which they cohabited along with the secondary applicant from their arrival in Coober Pedy, South Australia. This was cross-checked with the evidence provided as stated in paragraphs 22-26 of this Decision. In addition, the applicant, sponsor and secondary applicant verbally reinforced the evidence throughout the hearing.
34. Details were provided and discussed during the hearing in relation to the secondary applicant's, schooling, and the liaison role the sponsor performs between the school educating the secondary applicant.
35. Tradition household roles and their application in relation to the sponsor and the applicant were discussed during the hearing. Views were canvassed from the applicants and the sponsor as well as reference to the substantial number of Declarations placed before the Tribunal prior to the hearing, (paragraph 19 of this Decision). The Tribunal was satisfied of their correlation.
36. The Tribunal notes that the physical and climatic conditions relating to the area the sponsor and applicants live is not overly comfortable. It is reasonable to extrapolate from this that unless there was a genuine reason to live in one of the harshest environments in Australia, it is unlikely that people would willingly choose to do so without a substantive reason. The most likely reason for such residence by the visa applicant and her daughter is the existence of a genuine relationship, as they do not appear to possess any other qualifications or experience which would encourage residency.
37. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant demonstrated that the nature of the household is consistent with two people in a genuine and continuing relationship.

38. Social aspects

39. In assessing the social aspects of the relationship, the Tribunal has considered social interactions, evidence of joint social activities, representation of their relationship to others and recognition of the relationship by friends and family
40. The applicants submitted a range of annotated photographs showing various social activities together or as a family unit with friends. These photographs were corroborated by verbal evidence and written statements made by friends and colleagues.
41. The Tribunal notes the joint receipt from a local Church indicating an involvement in the local Church community. It also appreciates some of the statements made by community members indicating the social standing of the couple and the sponsor's stepdaughter, their community involvement and perceived contribution to the economic community.
42. The documentary evidence clearly demonstrates the fact that the sponsor, the applicant and the secondary applicants are perceived by many, as a family unit. Evidence of social engagements as a couple and a family unit was provided in written form by the forementioned Declarants and as oral evidence given during the hearing, by the applicant and sponsor.

43. The applicant and the sponsor were able with the body of evidence provided to demonstrate to the Tribunal that they represent themselves to the public, financial institutions, landlords, Tenancy Tribunal, utility providers, Councils, family members and friends as a married couple in a bona fide relationship. The Tribunal noticed the interpersonal behaviours exhibited during the hearing. This further encouraged it believe that the familial relationship was genuine.

44. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant and the sponsor demonstrated that the social aspects of the relationship were consistent with two people in a genuine and continuing relationship.

45. Nature of the Commitment

46. In relation to the nature of the commitment, the Tribunal considered the nature of the parties first meeting, relationship development, length of time living together, degree of companionship and mutual emotional support and whether they see the relationship as long term.

47. In regards, to the development of the relationship, the department accepted that the couple have known each other since February 2011, introduced online by a mutual friend, committed to each other in February 2011 and married on 22 April 2018. The Tribunal does not dispute this. This was correlated with verbal evidence given during the hearing.

48. The Tribunal accepts the range of written and verbal evidence demonstrating that the couple have lived under the same roof with the visa applicant's child since their arrival at the invitation of the sponsor in February 2018.

49. The Tribunal canvassed the views of the visa applicant's child during the hearing in relation to Australia, the relationship under review and how the community perceived her mother and stepfather's relationship and her observations. The views coincided with the statements and written evidence proffered.

50. The Tribunal notes that the distant past criminal record of the sponsor has been revealed to the visa applicant. The Tribunal has formed a view that it is unlikely that a relationship would continue under such circumstances without a genuine bond.

51. The not insubstantial evidence provided to the Tribunal detailing the couple's financial interdependence, liabilities and responsibilities, (detailed in paragraphs 22-26 of this Decision) shows strong evidence that the couple are mutually committed in an ongoing relationship. This was further reinforced by the general demeanour of the couple. The Tribunal once again notes, that the much of this evidence was not available to the delegate at the time of their decision.

52. The Tribunal has placed substantial weight on this evidence.

53. For all of the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the sponsor were in a genuine and continuing relationship and have a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.

54. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl.820.211(2)(a) and cl 820.221(1)(a).

55. For the reasons above, the applicant satisfies the criteria for the grant of the visa.

56. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

57. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211 of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations
 - The Tribunal finds that the secondary applicant is a member of a family unit of a person who satisfies the primary criteria of cl.820.211 and cl.820.221.

Peter Emmerton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).